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Points and Authorities on Behalf of Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

S. H. HARMON LUMBER CO.,

Libellant and Appellant.

v.

STEAM-TUG "WARRIOR," ETC.,

WILMINGTON TRANSPORTATION Co.,

Claimant and Appellee.

PAGE & EELLS,

PROCTORS FOR ~~APPELLANT~~

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The case as stated by the learned counsel for the appellant in the opening lines of his brief fairly states the question at issue between the parties except in one regard. It is hardly specific enough when it recites the libellant's cause of action as based on the negligence of the tug. It should have added, as alleged in the libel, that the stranding of the schooner was caused by the tug-master's attempt to tow her over the bar during an ebbing tide, when the water was too low to allow a vessel of the schooner's draft to cross it safely. This was the only issue tried. It is

the only issue referred to in the opinion of the learned Judge of the Southern District of California.

The libellant cannot now be heard to aver a different charge of negligence, such as improper steering or ignorance of the channel on the part of the tug-master. These causes are hinted at under the sixth point (p. 10) of the libellant's brief. The argument has no place in this appeal.

LAW OF THE CASE.

The claimant is not disposed to dispute the proposition of law that a tugboat man is bound to know the tides, soundings and other conditions necessary to the proper performance of his duties. He is a bailee for hire. He must be possessed of the ordinary knowledge required of those in his profession and must show due diligence and skill in its discharge. So far, we agree with counsel for libellant. We do not, however, concede the other proposition that the mere stranding of a vessel which is in tow, is *prima facie* evidence of fault on the part of the tug. The *rule* is not what he claims.

In the *Steamer Webb*, 14 Wall. 414, the Supreme Court says: "It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. *The burthen is always upon him who al-*

“leges the breach of such a contract to show either
 “that there has been no attempt at performance, or
 “that there has been negligence, or unskillfulness to
 “his injury in the performance. Unlike the case
 “of common carriers, damage sustained by the tow
 “does not ordinarily raise a presumption that the
 “tug has been in fault.”

In Transportation Co. vs. Downee, 11 Wall. 134.
 Justice Field speaking for the Court, said: “A
 “presumption of negligence from the simple occur-
 “rence of an accident seldom arises, except where
 “the accident proceeds from an act of such a char-
 “acter that when due care is taken in its perform-
 “ance, no injury ordinarily ensues from it in simi-
 “lar cases, or where it is caused by the misman-
 “agement or misconstruction of a thing over which
 “the defendant has immediate control, and for the
 “management or construction of which he is re-
 “sponsible, * * * (p. 135). The grounding
 “of the propeller and the consequent loss of the
 “coffee may have been consistent with the highest
 “care and skill, of the master, or it may have re-
 “sulted from his negligence and inattention. The
 “accident itself, irrespective of the circumstances,
 “furnished no ground for any presumption, one
 “way or the other. If, therefore, the establish-
 “ment of the negligence of the defendant was
 “material to the recovery, the burthen of proof
 “rested on the plaintiff.”

In *The Brazos* 14 Bltfd. 446, a case much like the one at bar, the Court said that it was undoubtedly true "that the libellant must show negligence "or unskillfulness in the tug."

See *Tug Adelia* 1 Hask. 505.

The libel charges that the schooner "Sailor Boy" was on January 5th, 1888, injured by the carelessness of the master of the tug "Warrior" in attempting to tow her over the bar at San Pedro at a time when the water was insufficient in depth to float her. It alleges that the master of the Schooner informed the tug master that the Schooner's draft was 14 foot 6 inches; that the tug man undertook to tow him, that the tide was ebbing and too low to admit of the towage and that disaster followed.

The defense is that the accident was caused by the fact that the master of the Schooner did not correctly give his draft, which was fifteen feet instead of fourteen and a half, and it alleges that while there was sufficient water for the latter draft, there was not enough to carry a vessel of the former draft. It denies that the tide was ebbing. The case for the libellant depends entirely upon its establishing by a preponderance of the evidence that the Schooner's draft was $14\frac{1}{2}$ feet and that there was not enough water on the bar to admit of her safe towage with that draft. The Court

below found that there was an entire failure to substantiate the libellant's charges, and we respectfully submit that its findings should be upheld.

We shall consider the leading facts in their natural order.

1. What was the Schooner's actual draft?
2. When was she taken over the bar?
3. What water was there on the bar when the Schooner struck?

I.

What was the "Sailor Boy's" draft when she asked for towage over the bar?

It is conceded that her Master gave it to the Tug Master as 14 ft. 6 in. It is claimed by the defense that it was 15 ft. 1-2 in.

No direct evidence of the actual draft on this occasion is produced by the Schooner. Her Captain testified it was 14 feet 6 inches, but he admits he did not know it except from what others told him. (Johnson, f. 99.) This was owing to the fact that this was his first voyage and that the Schooner was marked only to the 13 foot line; the higher numbers had been lost from the rudder post. "I told Melburg (Tugmaster) that the vessel was

“marked up to 13 feet. So I told him I figured
 “from the end of the rudder, and I told him I
 “*thought* that the end of the rudder was from 3 to
 “4 inches out of the water up at the mill in Gray’s
 “Harbor, *but that I didn’t measure it with a rule.*
 “* * * * * I made use of the expression,
 “3 or 4 inches, *something like that.*” (Johnson, f.
 93.) Capt. Mitchell says the rudder post was
 three inches out of the water. (f. 46).

Dahloff, the Schooner’s mate on the voyage,
 testified as the Captain did, that the draft was 14
 feet 6 inches, but his testimony is also worthless.
 He says he got the draft from Capt. Mitchell (her
 former master), then that the *figures* showed. “I
 “always look at the figures when I am loading and
 “Captain Mitchell said the figures were right. I
 “read the figures 14 on the vessel. The figures
 “were there up to and including 15.” (Dahlof,
 ff. 56, 57).

As Captain Johnson and Captain Mitchell (her
 former master) testified that the vessel was
 marked only up to 13 feet, Dahlof’s testimony is
 false and if he had any knowledge at all, it was
 merely hearsay. (Mitchell, f. 108.) Melburg,
 tug master, says that the day after the accident
 he examined the Schooner’s marks. “I saw she
 “was marked about 13 feet. Found these marks
 “correct. After that I sounded from the 13
 “foot mark up by the draft the Captain gave me.

“ He said his vessel when she was loaded, the
 “ rudder head was *two* inches out of the water.
 “ I found 15 feet $\frac{1}{2}$ inch. By the water line of
 “ the vessel when she was loaded, a black streak,
 “ I found the draft to be 15 feet 1 inch.” (Mel-
 berg, f. 171.)

Brown (test., f. 34) pretends that Melburg afterwards admitted that the Captain had given him the correct measurements. Melburg being dead, the rule regarding admissions of contradictory statements should be strictly enforced, viz: that an alleged admission made so long after the fact, to which on his examination, Melburg's attention was not called, should not be regarded as evidence. In a jury case, the Court, on request, would have excluded it altogether. The improbability of the truth that such admission was made appears from the cross-examination. “ He
 “ claimed the figures were wrong, and the vessel
 “ drew six inches more when he took hold than
 “ Captain Johnson represented.”

“ Q. That the figures on the rudder post were wrong?

“ A. He did not mention any figures. He
 “ said: ‘ You misrepresented your draft. If it
 “ was so much I could have towed you fine.’

“ Q. Did he say that before the measurement or after ?

“ A. They were having this talk *after* the

measurements." (Brown, f. 37.) If Melburg can be believed no such conversation occurred. (Melburg, f. 172.)

It is impossible to reconcile this detailed conversation made *after* the measurements had been taken, with an admission made at the same time that the draft had not been misrepresented. Brown's statements are flatly contradictory.

The most important, because the *only* direct evidence of the Schooner's draft was that given by Johnson, Mitchell and Melburg. The two first named witnesses state that the load line was three inches from the top of the rudder post, that is, that when drawing 14 foot 6 inches, the water line would be three inches from the top. Melburg measured up to a distance of two inches and found 15 feet $\frac{1}{2}$ inch draft. Now take off one inch, so as to place the load line at three inches, and it appears that the Schooner, if Melburg measured rightly, was drawing on that occasion 14 feet $11\frac{1}{2}$ inches. *Yet no attempt was made, though the schooner was in libellant's possession for a year or two after Melburg testified, to disprove the accuracy of Melburg's measurement.*

We submit that the libellant has not by these witnesses made out that the draft was 14 feet 6 inches. It was, however, attempted by indirection to show that the draft was as claimed, because under other circumstances and on other

voyages, the vessel had drawn no more than 14 feet 6 inches.

The evidence will be found so uncertain in its character as to be of no value whatever, *and this on the evidence of the libellant's witnesses.*

The Schooner had on board 365,000 feet of pine lumber. (Johnson, f. 87.) It was midwinter when she loaded at Gray's Harbor and wet weather. She was there 9 or 10 days. The trip to San Pedro was 13 days, wet and rough; hard weather, the usual winter weather. (Capt. Johnson, f. 95.) "We carried pine lumber to San Pedro. Took some off the dock, a good deal from the mill. The flooring was dry."

"Did it rain all the time that you were on the way down?"

"Yes, sir, it rained considerable." (Same, f. 103.)

"The flooring had come right out of the mill, into the shed and on board the schooner." (Same f. 106.) Nearly one-half of the cargo was on deck, 120,000 feet. (Same, f. 95.)

On the trip made from Gray's Harbor to San Francisco just prior to taking Johnson's deposition, the Schooner brought down 390,000 feet, drawing 14 feet 9 inches, 3 inches more. (Johnson, f. 89,) but on the trip referred to "we had fine weather, nothing like the San Pedro trip," and at Gray's Harbor "it rained a little once in a while." (Johnson, f. 102.)

Now Captain Mitchell was five years master of this Schooner (Mitchell, f. 108) and was called to testify on behalf of her owners. "Lumber," he says, "varies so much in heft that 380 or 360,000 feet might load her as deep sometimes as 400,-000 would at other times." (Mitchell, f. 108.) Less than the last named amount on one occasion loaded her down to 15 feet 1 inch. (Johnson, f. 105.)

The witness Mitchell shows how the weight of lumber in different cargoes varies and its causes; some lumber has more sap, some has lain longer in the water. After lumber is put through the mill, its weight may be further increased by rains. It is then piled in a body and does not dry out much. It retains its weight. Of course, there is a difference between lumber that has been exposed to the sun and that which is just out of the mill. The "Sailor Boy's" cargo taken on the trip of the accident had not lain there long. *At that time they were taking lumber away from there as fast as they sawed it. There was a great demand for lumber in the South at that time.* (Mitchell, ff. 100, 111.)

"Is it not the truth that there is a large difference or perceptible difference between cargoes shipped under similar conditions, one amount of lumber happening to turn out heavier than the same amount of lumber taken out at a different time?"

“ Yes, sir, and I will tell you the way we have
 “ to account for that. As a general thing the
 “ lumber that comes out of large logs has more
 “ heart in it, and the heart is always the lightest ;
 “ and sometimes the lumber is sawed out of
 “ smaller logs which makes the lumber have
 “ more sap, and it is therefore heavier.” (Mitchell,
 f. 111.)

“ Q. Have you any idea of what the average
 “ increase of weight would be in a cargo of lum-
 “ ber on the “ Sailor Boy ” which was wet as you
 “ have described cargoes, over the weight of a
 “ cargo of the same number of feet which had
 “ been submitted to the process of drying more
 “ or less ? ”

“ A. Well, we generally calculate it makes
 “ about a quarter of a ton difference on a thous-
 “ and * * * etc., etc.” (Mitchell, f. 113.)

The difference in weight, it thus appears from
 one who had several years experience in this par-
 ticular lumber and trade and in this vessel,
 between cargoes of the same lineal measurement,
 is great enough to have made an addition to the
 “ Sailor Boy's ” cargo in weight of one quarter of
 360, that is 90 tons, according to the amount of
 exposure which the cargo had undergone. A
 cargo of 360,000 feet which had been exposed to
 the ordinary action of the sun in the years pre-
 vious to the Southern “ boom,” was increased in

weight 90 tons-after the boom commenced, when as the witness says: "There were two years
 " time, and that was during the time when Capt.
 " Johnson took the "Sailor Boy" when there
 " was very little chance for lumber to accumulate
 " on the wharf, because there was vessels there to
 " take the lumber as fast as it was sawed out, *and*
 " *so it didn't accumulate the way it does now.*"
 (Mitchell, ff. 114, 115.)

Considering the ability of the Schooner to carry 400,000 feet on occasion, and the fact that an available market was to be found in the South for every foot she could carry, what reason can be suggested for her taking only 360,000 feet on this particular occasion, except that suggested by the evidence of Capt. Mitchell, who so well knew the vessel, viz: that 360,000 feet would load her down on one trip as much as 400,000 would on another.

If now it shall be made to appear later on in this brief that there was ample water on the San Pedro Bar to allow of a 14 foot 6 inch vessel going over safely, can it be said that the libellant has, in face of the claimant's absolute denial, successfully sustained the burthen of proof on the point that the vessel's draft was only 14 feet 6 inches?

The learned Counsel for the libellant seeks to break the force of the evidence given by his own witnesses (Brief, 9) by asserting that the absorp-

tion of moisture on the voyage would be insignificant. Let that be granted. Where is the evidence, other than mere conjecture, shown to be unreliable by his own witnesses, that the vessel drew 14 feet 6 inches at Gray's Harbor? Mitchell shows that it was quite possible that she drew more than that and the occurrences at San Pedro go far to prove that her draft was, in fact, greater.

It must not be forgotten that no charge is made in the libel, or insinuation thrown out in the evidence that the tugmaster failed to follow the channel. The only issue is that of the depth of the water and the draft of the schooner. If the water was there, sufficient to float a vessel drawing 14 feet 6 inches, then her striking must be attributed to an increased draft and the tugmaster's measurement truly states what she drew.

II.

At what time was the "Sailor Boy" taken over the bar?

The Captain of the Schooner merely guesses at the time. He states what it probably was when he came up to the bar, after making a number of estimates of the space of time which it took to do various things before that. (Johnson, ff. 97, 98.) The mate fixes the time of striking about 2:15,

but did not look at the clock—had looked at it about 20 minutes before. (Dahlof, ff. 55.) Afterwards he said it was twenty minutes past two when the tug took hold of the schooner (f. 58.) This is the man who had seen the figures 14 and 15 marked on the rudder, though there were no such figures there. If counsel is seeking some one upon whom to charge the crime of perjury, Dahlof is his man.

Hannah says the striking took place about 2:30, but he is not sure. (f. 41.) Weldt says she struck at a quarter to three, and he bases his recollection on the fact that he had intended going to Los Angeles on the 3 o'clock train, which he missed on account of the lively interest he took in the disaster. Why he should have made the time on that account 2:45, and not 2:15 he does not say. (Weldt, f. 46.) Brown (ff. 31–33) also estimates the time, but on no reliable basis. Madsen, of the Schooner "Reporter," says that vessel went over the bar at 2 o'clock and before the "Sailor Boy" was taken in tow. (f. 73.) The unreliable nature of this man's testimony will appear further on.

As regards the time of crossing and striking, (they were, of course, simultaneous) the libellant presents the same indefinite, unreliable class of evidence. Captain Hannah and Johnson respectively place it at 2 and 2:30 and Weldt at 2:45.

Captain Melburg of the "Warrior" says the ship struck at 2:05. He looked at his time. It was natural that he should do so, as the striking must have instantly connected itself with the time the tide had run. (Melburg, f. 165.)

Barce, a Government employee, was on the jetty when the vessel struck. He noted the time in his memorandum book as 2:10. (Barce, f. 208.) This witness was virulently attacked in cross-examination, charges made that he was a drunkard, etc. But he has been in the employ of the U. S. Engineers since 1870 on responsible duty and Mr. Von Geldern, one of the engineers, who was constantly accompanied by Barce for months in 1887 and 1888 never knew him to be intoxicated. (Von Geldern, f. 251.)

It seems that the time tables to which Barce referred as proof of the fact of the employment of men on the jetties shows that men were, perhaps, not at work on the 5th of January. Col. Benyard does not know whether they were discharged the 4th or 5th. But they were, as he says, working there on the 1st, 2nd, 3rd and 4th. Now Barce says he was down that day on Range 15 and that he crossed to the Channel Range. (Barce, f. 208.) After the lapse of three years and a half, he may well be forgiven if he makes a mistake of a day in the fact whether men were at work there. It is not unlikely that he would

visit the work that he was himself constantly employed in.

But he is also corroborated by Simie, Captain of the "Falcon," whose testimony as to the time is conclusive, unless he too fabricated his note book. He left to go to the Bar on hearing the distress whistle of the "Warrior." It was then 2:15. (Simie, ff. 227-232.)

These witnesses swear to what they know and what they did, *and each of them took the time in accordance with a duty imposed on him.* (Simie, f. 227, Barce, 207.) As to the comparative value of such testimony with the guesses and opinions produced by the libellant, we may quote the language of Judge Clifford:

"Both the master and mate knew what their own acts were, and unless their statements are correct, they must have wilfully perverted the truth. Those examined by the respondents may be in error, and yet may not have stated what they do not believe to be true."

Camp vs. Ship Marcelles, 1 Cliff, 486.

"The testimony of witnesses to their knowledge of what occurred upon their own ship justly outweighs that of superior numbers, who speak only from a judgment or opinion formed from distant observation."

The Governor, Abb. Adm. R., 114.

These remarks are quite applicable to the case at bar when applied to the testimony given on the question of the draft of the schooner, the time of crossing the bar and its condition as to the height of swell. The evidence of the libellant's witnesses was that of men who in the first case were giving hearsay, in the second their mere opinions and guesses of time, and in the last case were telling what they remembered as having seen from a distant point of observation. In each case there was liability to error. Against them the claimant opposes witnesses whose habit and duty and actual presence made them accurately note the true condition of affairs.

III.

What was the condition of the tide when the schooner was taken over?

The libellants state that it was ebbing. It is, of course, of no consequence whether in the *technical* sense it was ebbing, provided that there was sufficient water to take the vessel over safely. When the witnesses say the tide was ebbing, they mean that the water was *running out*, not that the moment had arrived and passed, which, in the scientific sense, is termed the exact point of high tide. The period known, ordinarily, as slack water when there is practically no perceptible dif-

ference in the depth of water, is clearly not intended to be included by the witnesses in their understanding of an ebb tide.

On the question what this period is, what it means with reference to the depth of water, the Court will not hesitate to accept as authoritative, the evidence of Mr. Von Geldern, whose work in the Coast Survey and Engineer Corps has become the guide of the mariners on this Coast.

“It is very difficult,” he says, “to detect any “difference in the height of the tides in the first “half-hour. They are about stationary. A neap “tide of that character will fall about seven or “eight per cent. of its range *in the first hour.*” * * “That percentage would probably repre- “sent *a tenth and a half or two-tenths of a foot* “that it would fall in the first hour.” * * “It “*may be 30 or 40 or 50 minutes before there is any* “*appreciable difference in height.*”

Von Geldern, f. 248.

We ask the Court, at this point, to note the accuracy of Capt. Melburg’s testimony. Speaking of the increase of water in the last hour of the flood tide, he says: “In one hour we only get $1\frac{1}{2}$ “inches.” (f. 200.) This evidence was given three years before Von Geldern was called.

“The high water on that day was 4.1, and it “fell to a low water of one foot, that is, there were

“three feet and one-tenth of a fall. That is the
 “range of the tide; three feet and one-tenth of that
 “particular tide, eight per cent. of that range
 “of three feet and one-tenth that tide will
 “fall in the first hour, which will be about 25-
 “100 of a foot; so if the tide be four and one-
 “tenth at high water, *one hour afterwards, it will*
 “*be two-tenths less,* * * * which would leave
 “three feet nine-tenths an hour after high water
 “had been reached.” (Von Geldern, p. 249, 250.)
 An actual difference, therefore, of less than two
 and one-half inches.

High water at San Pedro on January 5th, 1888,
 was about 2 o'clock. (f. 248.) Hence, whatever
 water there was on the bar on that day at that
 hour *was diminished at three o'clock by not more*
than two and four-tenths inches.

The witness gives with equal clearness as the
 result of his own soundings, accepted and used by
 the Engineers, and the Coast Survey, the depth
 of water on that day and that tide at high water
 on the outer bar at San Pedro. “These figures,”
 he says, “are *absolutely* correct.” If the printed
 chart shows any difference from these figures, this
 fact may be attributed to the tendency, “particu-
 “larly in the Coast Survey, to get the least water
 “to give the ship the benefit of the doubt, rather
 ‘to have it the least water than absolute correct-
 “ness.” (f. 246.)

These soundings show that at two o'clock, high water, the lowest depth in the channel, was fifteen feet six-tenths or fifteen feet seven and one-fifth inches. (f. 108.) This depth would practically be found up to *three o'clock* on that day. This depth was the depth taken not from the calm surface of the water, but from the lowest part of the swell. "It is always a rule with us to take the "bottom of the trough of the sea and never the "top." (Von Geldern, f. 243.)

Now, the Captain of the "Warrior" sounded, as was his duty and custom, as he went out to the "Sailor Boy." He sounded with a pole, and found the lowest water to be 16 feet, 4 inches, (Melburg, f. 162) but the existing swell on the bar was about half a foot. (Melburg, f. 186.) This should be deducted from his sounding in order to use the same rule as that of the Engineers. This would give him "in the trough of the sea," fifteen feet ten inches as against Von Geldern's 15 feet seven and two-tenths. The figures agree as nearly as could be expected under all the circumstances, and they prove a sufficient amount of water to float the "Sailor Boy" provided that she was drawing 14 feet 6 inches, and was towed over the bar not later than three o'clock.

We may here be allowed to observe that there is no evidence or reason given that it is dangerous to tow over the bar after the point of high tide

has been reached. It is, as common sense dictates, purely a question of depth. The direction of a current, *particularly when it is not yet an appreciable quantity*, cannot affect a vessel which is being propelled by steam.

We come now to the testimony on libellant's behalf all of which charges in general terms that the tide was ebb.

Captain Johnson says the tide was ebb (Dep. 2) not because he observed it to be the fact, but "because so many people in San Pedro said so." (f. 100.) The condition of the tide was not such as to attract the notice of Dahlllof, the mate. (Dahlllof, f. 55.) Captain Jaehnsen says the tide was ebbing when the "Warrior" *went* for the "Sailor Boy". He could see that it was ebb with the naked eye. "I looked at the gauge to see 'how much had run—*six or eight inches.*" (Jaehnsen, ff 121, 122.) We looked at the "gauge on the top of the wharf." (Same fol. 122.)

Afterwards, he said the tide had fallen that amount when the "Sailor Boy" struck, (Same, f. 125.) In fact he did not notice *that the tide had fallen* until he looked when he saw the schooner pounding. (Same, f. 126.)

Again, the witness says that there are generally two feet more water on the bar than the gauge will show (same, f. 124) that he was "watching "the tide gauge" long before the "Warrior" went

out for the "Sailor Boy" (same, f. 121.) It is strange that he should testify that he saw the fall of the tide, 6 to 8 inches, by the gauge (f. 122) and yet admit that you cannot "tell on the gauge whether it is rising "or falling after going up so high." (same, f. 125.) The latter statement is undoubtedly true. The gauge was placed on the wharf before the bar was dredged out, and the mere glancing at it gives no idea of the actual condition of the tide, owing to the wash. To use this gauge, a person "would have to mark it with a pencil, and "see whether it was rising or falling." (Simie, f. 233.) Captain Hall says: "They would have to "take a pencil and mark it, and then they could "tell if it was going down. They would have to "stay and watch it for some time." (f. 139.)

Now, the witness Jaehnsen, whose testimony we have tried to analyze, says that on that same day he went over the bar with his steamer, two hours before high tide, drawing $13\frac{1}{2}$ feet, and *then* there was a foot of water under his keel. (Jaehnsen, ff. 127, 128.) This evidence produced by the libellant effectually disposes of the Captain of the "Reporter," who says he touched going over the bar at 2 o'clock, (Madsen, ff. 70, 71) while drawing 13 feet 9 inches, (same, f. 69) unless the touching happened by reason of his being for a moment out of the channel. This same Madsen

who judged of the ebbing tide as he passed the railroad wharf, was cast off some 500 yards below the wharf, and *drifted* up to the lumber Company's wharf (Madsen, f. 73) a further distance by actual measurement, of 3500 feet. (Simie, ff. 234, 235.) It is pretty hard to believe a schooner's drifting powers against an *ebb* tide to equal this. Jaehnsen, a witness for libellant, said of it: "If the " 'eporter" drifted up, *there must have been a flood* tide." (Jaehnsen, f. 124.) "A vessel would shoot some, but the wind there "did not blow enough to amount to much." (same, f. 129.)

Weldt, a pilot for the outer harbor, not a bar pilot, said the tide was ebb when the schooner struck, that it had fallen five or six inches. That he had examined both gauges (Weldt, f. 45) but the gauge above the wharf, as we have seen, would not tell him anything accurately, and the same may be said of the one under the wharf. (Simie, f. 232, 233.) The narrowness of the channel and passing steamboats would create the appearance of an ebbing tide when it did not in fact exist. The inaccuracy of Weldt's testimony is apparent when it is read in connection with that of Von Geldern. There could not have been such a fall in the tide, even assuming that Weldt was right in the time of striking, viz. 2:45, a point in which he differs from everybody else. At

high tide that day he gives 14 feet 8 inches or 15 feet of water, in which he is clearly wrong, according to the Engineer. He gives 2:28 as the hour of high tide; it was 2 o'clock instead. After the first half hour "the tide would run out quite brisk," he says, while we now know, the motion would be unappreciable. It was quite rough on the bar, he says, though Madsen of the "Reporter" says it was "slightly rough." (f. 79) and Johnson of the "Sailor Boy" and Dohloff, his mate, failed to notice anything unusual enough on the bar to provoke mention in their evidence. Barce, Melburg and Simie say it was ordinarily smooth. (Barce, f. 220; Simie, 235; Melburg, 186.) Capt. Hannah says it was rough but he was on the railroad wharf with Weldt, a long distance off. (See Hall, f. 138; Simie, 235, 236) and would be likely to judge of the water by the motions of a grounded vessel, which would be unreliable. It is suggested in libellant's brief that the swell was so great, according to Melburg, that he would not tow alongside, but Melburg's evidence is that on account of the usual swell they *never* tow alongside. (Melburg, f. 166.)

Hannah, also, testifies to an ebbing tide because the gauge showed it to be such. "It was the first of the ebb tide." But as we have seen the gauge is of no value, unless carefully watched for some time and marked with a pencil.

On the other hand, on behalf of the claimant, the evidence is of the strongest kind that the tide was not ebbing, in the sense of flowing out, or of creating a diminished depth of water. There can be no successful contradiction of Von Geldern and Melburg in this particular. The amount of water necessary to float the "Sailor Boy," if she drew 14 feet 6 inches, was unquestionably there. Captain Hall, of the Pacific Coast Steamship Company, who has entered and left that port with steamers for years, crossing the bar four times every eight days, (f. 133) and whose duty leads him to make constant soundings, says that on January 15th, 1888, at 2:15 P. M. the depth of water on the outer bar was 15 feet 9 inches, again a corroboration of Von Geldern and Melburg. There would not be an inch of difference half an hour after high water. (Hall, f. 135.)

Now, Simie's memorandum made at Melburg's request (Simie, f. 231) shows that at half past 1 of that day, the gauge showed 12 feet 8 inches, to which must be added the difference in depth not actually noted by the gauge, viz. 3 feet for the outer bar. This gives 15 feet 8 inches within half an hour of high water, or four-fifths of one inch less than Von Geldern's soundings, assuming, as we have seen is the case, that for a space of time previous as well as subsequent to the

moment of high water, there is no appreciable difference.

Brown, a witness for the libellant, says that when the "Sailor Boy" struck, "the tide must "have been ebbing the least bit, so that it would "not amount to much, turning the sloops and "yachts; just turning in the ebb; they were "headed neither one way nor the other." (Brown, f. 33.) "They had just about half turned. (f. 39.) It was, therefore, slack water, according to this witness, whose evidence, except in this particular about the heading of the vessels, is of no value.

We have, we think, given the whole of this mass of evidence careful attention, and the result is, that again, the libellants present vague and uncertain opinions against the best evidence known in such matters to the law. Of Von Geldern's work in the Engineer corps, it may be said as was said by the Supreme Court of the meteorological records of the Signal Service: "Extreme accuracy in all such observations and in recording "them is demanded by the rules of the Signal "Service, and it is indispensable, in order that "they may answer the purpose for which they are "required. They are, as we have seen, of a public "character, kept for public purposes, and so immediately before the eyes of the community that "inaccuracies, if they should exist, could hardly

“escape exposure.” The Court held such records to be admissible evidence of the facts they stated, though not kept by a public officer himself, and though no statute authorized their admission.

Evanston vs. Gunn, 99 U. S., 666.

Von Geldern's maps and soundings alone come within the rule above stated, but Melburg, Simie, and Hall, also testified to the great fact in this case from knowledge acquired in a *quasi* public duty, viz. the constant sounding of the bar so that the property of others in their charge should not be imperilled. Madsen, a witness for libellant, testified to this custom on Melburg's part, f. 76. Against this testimony the libellants oppose Weldt, a man whose ignorance is readily accounted for by the fact that his business does not require him to pilot vessels over the bar, but only up to it. (Hall, f. 154.) Weldt gave it as his opinion that proper soundings could not be taken by the use of a pole on a tug, but in this he disagrees with Hall, while Von Geldern says all his soundings were taken from a boat with a pole, and that this is the proper way.

We have seen that Melburg, in accordance with established custom and as a duty, sounded as he went over the bar to bring in the “Sailor Boy.” He stopped the engine for the purpose. (Melburg, 163.) Madsen, Master of the “Reporter,”

who accompanied him, corroborates the fact of these soundings being taken. (Madsen, 76.) Now, in order to sustain the theory that there was not enough water, it must be assumed that Melburg undertook *what he knew to be impossible*. Such an assumption is unworthy of a moment's consideration. So far from making such an attempt, he says himself, "I would not have taken "in the "Sailor Boy" that day if she had been "drawing 14 feet 8 inches," only two inches more than the draft given him. (Melburg, f. 200.) This on account of the shallowness of the inside bar. Libellant's counsel assumes that the schooner's draft was less amidships than aft, and argues that because she struck somewhere about amidships, she would be drawing 14 feet 9 inches at the point of striking. He assumes the vessel had a straight keel, whereas some schooners have their greatest draft amidships.

We close this examination of the facts in the case by referring to the evidence of Johnson, Master of the "Sailor Boy," taken two years after his first deposition. That evidence tended to show that the salt water of Gray's Harbor is fresh and that a draft of 14 feet 6 inches shown there would mean a draft of three inches less at San Francisco or San Pedro. If this be true, and it be also true that the Schooner's draft at Gray's Harbor was 14 feet 6 inches, the fact of the sufficiency of the

water at the time of crossing, which is the only question at issue, becomes more palpable than ever. But the correctness of this new theory challenges the value of the experiment on which so much reliance is placed and referred to in that deposition. It was claimed that her draft at Gray's Harbor on the voyage of the disaster was 14 feet 6 inches with 360,000 feet of lumber on board. It was found, and under similar circumstances, as libellant's claim, she had the same draft at San Francisco. We have already shown how useless this comparison would be by the evidence of libellant's witnesses. If the libellant had proved by actual measurement that the vessel drew ten feet only, this fact could not overthrow the evidence of Von Geldern and the other witnesses as to the depth of the water on the San Pedro Bar. It would only prove that the disaster was due to some other causes than the shallowness of the Bar. With such other cause, the Court has nothing to do. It is not an issue in the case.

The differences between Chart 610, introduced by the libellant, and Von Geldern's work, on which it is based, is clearly explained in the latter's testimony.

We sum up the evidence in a few words. The only direct evidence of the Schooner's draft is that of Melburg, who measured her and found it to be 15 feet $\frac{1}{2}$ inch. Johnson and Mitchell could not

testify from any personal knowledge, and Dahlof, the mate, stands, by their evidence, convicted of falsehood.

She was taken over the bar at two o'clock when the tide was at its height, and when there was ample water to float a vessel of the draft given by her Captain, but whether it was two o'clock, half past two or even three o'clock when the tug attempted to tow her, the highest class of evidence known to the law, proves that there was at all of those times water enough on the bar to float her.

The libellant having tendered the issue on this point and having confined his charge of negligence to the attempt to tow over a shallow bar, we respectfully submit that the Court below could not have found upon that question in any way other than it did.

Respectfully submitted,

PAGE & EELLS,

Proctors for Appellee.